

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY DORLING,

Defendant-Appellant.

UNPUBLISHED

June 13, 2013

No. 309657

Wayne Circuit Court

LC No. 11-011266-FH

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of intentionally pointing a firearm without malice, MCL 750.233. Defendant was sentenced to one year of probation. We affirm.

This matter arises out of a domestic disturbance to which police were summoned in Detroit. The person who summoned the police told them that she had belongings in a house in which she used to live, but the locks had been changed and she could not gain entry. The responding officers knocked on the door and announced their presence. They heard what they believed to be a shotgun racking, whereupon the door opened, they observed the barrel of a rifle being pointed at them, and someone inside told them to get off the porch. The police immediately retreated and called for backup. While waiting for backup to arrive, defendant voluntarily left the house with his hands up and surrendered peacefully. Officers then searched the house and found a rifle lying upright next to the door. The rifle turned out to be an unloaded, antique Japanese rifle from World War II, and it was missing its bolt, a critical component without which it could not fire. The police searched for, but never found, the bolt or any ammunition for the rifle.

Defendant was charged with two counts of assault with a dangerous weapon, MCL 750.82, and one count of possession of a firearm during the commission of a felony, MCL 750.277b. There are numerous statutory definitions of “dangerous weapon” that explicitly disregard whether a gun is operational; see MCL 766.14(4)(b)(i), MCL 764.1f(2)(b)(i), MCL 712A.2(a)(1)(B)(i), and MCL 600.606(2)(b)(i), all of which concern juveniles; and MCL 750.110a(1)(b)(i), which concerns home invasions. However, in the absence of a specifically applicable statutory definition, our Supreme Court has explained that a gun that had been rendered inoperable “was not capable of propelling a dangerous projectile, and thus its use in an assault did not violate MCL 750.82,” even if the gun actually contained live, albeit unfirable,

rounds. *People v Stevens*, 409 Mich 564, 567-568; 297 NW2d 120 (1980). Defendant was nevertheless bound over because at the time of the preliminary examination, defendant apparently conceded a small amount of factual doubt as to whether the rifle actually had been operational at the time it was pointed at the officers.

At the bench trial, it was stipulated that defendant had never possessed the bolt for the rifle, so the rifle was in fact inoperable and had been for as long as defendant owned it. The trial court granted the prosecutor's motion to add a misdemeanor count of intentionally pointing a firearm without malice, MCL 750.233. At the conclusion of the bench trial, defendant was acquitted of his original charges but convicted of intentionally pointing a firearm without malice. Defendant contends on appeal that not only was the rifle not a "dangerous weapon," but its inoperability also renders it not a "firearm" for purposes of MCL 750.233. Under the circumstances of this case, we disagree. Whether conduct falls within the statutory scope of a criminal statute is a question of law that is reviewed de novo on appeal. *People v Rutledge*, 250 Mich App 1, 4; 645 NW2d 333 (2002).

Initially, when read alone, *Stevens* could be interpreted as implying that an inoperable gun might not be a "firearm." *Stevens* cited and referenced MCL 8.3t, which states that "[t]he word 'firearm,' except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas or air." *Stevens*, 409 Mich at 567. The Court noted that the inoperable gun at issue "was not capable of propelling a dangerous projectile." *Id.* MCL 8.3t is substantially identical to the definition of a "firearm" relevant here, from MCL 750.222(d): "a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BBs not exceeding .177 caliber." It might appear, therefore, that an inoperable gun does not fit the definition of a "firearm." However, *Stevens* did not hold that the gun at issue was not a "firearm," but rather only that it was not a "dangerous weapon."

More recently, our Supreme Court addressed whether a broken gun that was missing parts and probably could not be fired even if they were replaced constituted a "firearm" as defined in MCL 750.222(d). *People v Peals*, 476 Mich 636; 720 NW2d 196 (2006). Our Supreme Court explained that the use of the word "may" in MCL 750.222(d) is a reference to design objectives rather than present physical capabilities. *Id.* at 640-652. The same reasoning applies here. Consequently, the rifle, albeit inoperable, was a "firearm" for purposes of establishing the crime of intentionally pointing or aiming without malice at another.

Defendant also contends that defense counsel's failure to raise the issue concerning the operability of the rifle constituted ineffective assistance of counsel. Defendant did not move for

a new trial or *Ginther*¹ hearing; therefore, our review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). We find none. Defense counsel’s failure to either “advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Making the argument that the rifle was not a “firearm” would not have been a frivolous one. Nevertheless, as discussed, the rifle constituted a “firearm” for the purpose of MCL 750.233, despite its inoperability. Because the argument that defendant contends should have been asserted by trial counsel is ultimately meritless, at least on the facts of this case, trial counsel could not have been ineffective for failing to assert it.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).